Supreme Court, U.S.
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No. 94- ____

In The
SUPREME COURT of the UNITED STATES
October Term, 1994

PEE DEE FEDERAL SAVINGS BANK,

Respondent,

v.

JOHN T. CRAWFORD AND MARY A. CRAWFORD,

Petitioners,

Petition For A Writ Of Certiorari To The Supreme Court Of The United States Of America

---

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED FOR REVIEW

Does failure to give timely notice of a mortgage foreclosure hearing, and the South Carolina Court Systems' enforcement of that foreclosure violate the Fifth and Fourteenth Amendments' guarantee of Procedural Due Process, where both liquidated and non-liquidated damages are sought?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, John T. Crawford and Mary A. Crawford, and the Respondent, Pee Dee Federal Savings Bank.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners John T. Crawford and Mary A. Crawford respectfully pray that a writ of certiorari issue to review the June 14, 1993, judgment and opinion of the South Carolina Court of Appeals, and the September 22, 1994, denial of their Petition for Certiorari to the South Carolina Supreme Court in the above-captioned proceeding.

OPINIONS BELOW

The Decree of Foreclosure of the Court of Common Pleas dated January 10, 1991, was not published but is included in the appendix hereto, at App. 1, infra.

The Order of the Court of Common Pleas denying Petitioner's Motion to Vacate Judgment, dated December 4, 1991, was not published but is included in the appendix, at App.8 , infra.

The opinion and judgment of the South Carolina Court of Appeals dated June 14, 1993, was not published but is included in the appendix, at App.16 , infra.

The South Carolina Court of Appeals' denial of Petitioner's Petition for Rehearing dated September 8, 1993, was not published but is included in the Appendix, at App.18, infra.

The South Carolina Supreme Court's denial of Petitioner's Petition for a Writ of Certiorari dated September 22, 1994, was not published but is included in the Appendix, at App. 19 , infra.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the South Carolina Court of Appeals of June 14, 1993. Petitioner's subsequent Petition for Rehearing was denied on September 8, 1993. Furthermore, the Petitioner's Petition for a Writ of Certiorari to the South Carolina Supreme Court was denied on September 22, 1994. The United States Supreme Court has jurisdiction to review all

cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution provide in pertinent part that a parties whose significant rights in property are to be affected by a legal proceeding are entitled to be heard and, in order that they may enjoy that right, they must be given adequate notice thereof.

STATEMENT OF THE CASE

This action for foreclosure on real estate mortgages was commenced with the filing of a Summons and Complaint and Notice of lis pendens for Docket Number 90-CP-33-300, Docket Number 90-CP-33-301 and Docket Number 90-CP-33-302 in Court of Common Pleas for the Twelfth Judicial Circuit of South Carolina, on November 6, 1990, after the Petitioners became delinquent with their monthly payments. The Bank did not notify them of the delinquency pursuant to the terms of the mortgage but rather, contacted its attorney, Mr. J.P. Williams, and consequently the Appellants-Defendants were served with the Summon(s) and Complaint(s) on November 9, 1990. The Complaint(s), prayed for foreclosure of mortgage liens held by the Respondent against four individual pieces of property owned by the Petitioners.

Although they did not file a written Answer, the

Petitioners did visit the Bank within 30 days after the service of the Summons and Complaint and attempted to re-instate the loans. They were informed that the bank would not allow them to re-instate the loans, that only full payment of all amounts owed under the mortgage would stay the proceedings. Two additional attempts were made by Petitioners to reinstate their loans but these attempts proved futile despite the fact that on another occasion when the Petitioners had become delinquent, the Bank had allowed them to reinstate the loans by paying arrearages plus attorney's fees.

The secondary lienholders filed Answers, and the Respondent sought and received an Order of Reference, (Docket Numbers 300, 301, and 302) from the Circuit Court on January 2, 1991. The matter was duly referred to a special referee, and came before the Honorable W.B. Norton for a hearing on the foreclosure on January 10, 1991. Though the Respondents made numerous attempts to negotiate with representatives of the Bank, they were not notified of, nor did they give consent to, the Order of Reference.

Contrary to statements made on the record, by Respondent's counsel, no Affidavit of Default was filed in this matter, and no entry of default was made by the Clerk of Court, nor was an Order of Default signed by the Court prior to the foreclosure hearing on January 10, 1991. The Judgment Record Roll in the matter, Docket Numbers 90-CP-300, 301, and 302, does not contain a record of notice of the foreclosure hearing to the Appellants.

The Petitioners assert that they were not given notice of the date, time, and place of the foreclosure hearing. Respondent's counsel asserts, by way of affidavit filed during the Appellants Motion to Vacate hearing, on October 29, 1991, that the Petitioners were given two days oral notice of the foreclosure hearing, at a meeting in his office, held approximately nine months prior. However, recorded

testimony, from the foreclosure hearing indicates that Respondent's counsel informed the court that an Affidavit of Service and an Affidavit of Default were both filed with the Court.

During the foreclosure hearing Respondent's counsel moved into evidence the promissory notes and the mortgages for each piece of property listed in the Complaint(s). Testimony was taken from the Respondent's Vice President as to (1) the terms of indebtedness; (2) the number of months that the Appellants were in default on their mortgage notes; (3) the monthly indebtedness; and (4) the date the note was accelerated - October 15, 1990. The Court ignored all other items contained in the mortgage, including those terms regarding the requirement that proper notice of such proceedings be given. Testimony was also taken as to the attorneys fees owed for each Cause of Action: Docket Number 300, total amount $6,000.00; Docket Number 301, total amount $2,000.00; and Docket Number 302, total amount $3,000.00. The Secondary lienhlders submitted sworn testimony requesting attorney's fees Furthermore, the Answer of one of the secondary lien holders requested costs and disbursements.

The Decree of Foreclosure as Ordered held the following: (1) that the Appellant-Defendants were in default; (2) that the Secondary lienholders had filed an Answer; (3) that an Affidavit of Default had been filed; (4) that testimony and plaintiff's exhibits were received into evidence without objection; (5) that the monthly notes of indebtedness were as testified; (6) that the plaintiffs had duly executed mortgages and promissory notes; (7) that the terms and conditions of the notes and mortgages were broken by the Appellants-Defendants; (8) that the entire note(s) on each indebtedness was accelerated and the entire amount became due and payable of Docket Number 300- $36,333.85, Docket Number 301 - $31, 584.92, and Docket Number 302 - $34,214.28;

(9) that the promissory note and mortgage provided for reasonable attorney fees and costs; (10) that the attorneys fees be awarded in the amount of $6,000.00 for Docket Number 300, $2,000.00 for Docket Number 301, and $3,000.00 for Docket Number 302; (11) that costs be awarded in these actions; (12) that the right of redemption be forever barred; and (13) that the mortgaged lands and property be sold at public auction to the highest bidder on February 4, 1991; and (14) that the lienholders be paid in the order of their established priorities out of the proceeds of the sale.

The Special Referee filed a Report of Sale on February 19, 1991, with Exhibits itemizing costs and expenses and a Constructive Receipt of Sale.

The Petitioner retained an attorney who initially filed a Notice of Intent to Appeal the Decree of Foreclosure on February 4, 1991, but subsequently abandoned the Appeal and filed a Motion to Vacate the Judgment Decree of Foreclosure.

The matter was originally scheduled by the Clerk of Court before the Circuit Court. Because the Order of Reference directed that all appeals would be made directly to the Supreme Court, the Circuit Court referred the Motion to Vacate to the Special Referee for a hearing. The Appellants Motion to Vacate was based on South Carolina Rules of Civil Procedure, Rules 5(a),and 60(b)(5), as well as the records, judgments, pleadings and documents in the case.

Respondent's Counsel filed an affidavit with the Special Referee less than five days prior to the hearing on Appellants' Motion to Vacate.

All parties were present at the hearing on Appellants' Motion to Vacate, and the Special Referee entered an Order on December 5, 1991, refusing to vacate the prior Judgment Decree of Foreclosure. From that Order refusing to vacate, the Petitioners appealed the matter to the South Carolina

Court of Appeals, which affirmed the lower court's Order. The Court based its decision primarily on the affidavit presented by Respondent's Counsel in the Motion to Vacate hearing , which alleged that the Petitioners had actual knowledge of the date, time, and place of the foreclosure hearing. A Rehearing was requested by the Petitioners but was denied. Pee Dee Federal Savings Bank v. John T. Crawford and Mary A. Crawford, 93-UP-179 (S.C. St. App. filed June 14, 1993). On September 22, 1994, the South Carolina Supreme Court denied Petitioners' petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THE SOUTH CAROLINA COURT OF APPEALS FAILED TO PROPERLY PROTECT THE RIGHTS TO PROCEDURAL DUE PROCESS WHICH SHOULD BE AFFORDED MORTGAGORS IN FORECLOSURE PROCEEDINGS WHEN IT UPHELD A FORECLOSURE WHEREIN ADEQUATE NOTICE OF THE FORECLOSURE, AS REQUIRED BY THE TERMS OF THE MORTGAGE WAS NOT GIVEN.

This Petition invites the Court to resolve the issue of whether mortgagors are entitled to formal written notice of foreclosure proceedings, in order for their rights in real property to be terminated. It is well settled that in mortgage foreclosure actions, the property interests of mortgagors is affected. The Court has previously noted that "there can be no doubt that at a minimum, [the Due Process Clause of the Fifth Amendment requires] that deprivation of life, liberty or property by adjudication be precedent by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

306, 313 (1950). "For more than a century the central meaning of procedural due process has been clear: `Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), citing *Baldwin v. Hale*, 1 Wall 223, 233. Furthermore, in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1964), the Court stated that notice and opportunity to be heard, "must be granted at a meaningful time and in a meaningful manner."

The facts in the present case indicate that the Petitioners may have been given verbal notice of the foreclosure hearing as much as two or three days in advance, but that there was no formal written notice given. It is important to note that "[t]he requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions." *Fuentes*, at 81. The requirement that adequate written notice be given in situations involving mortgage foreclosures, only serves to better ensure the likelihood that the proceedings will be fair, and not result in arbitrary or mistaken deprivations of property. Despite the fact that the Petitioner had not previously answered the Respondent's Complaint, there is a fundamental unfairness involved in conducting a hearing wherein a party's property is to be taken, without first having provided them with adequate notice and opportunity to be heard. Due to past experiences with Pee Dee Federal, the Petitioners were until just prior to the hearing, of the impression that the Respondent would allow them to cure their default and reinstate their loan. They were therefore surprised by the fact that Respondent completed foreclosure proceedings and did not seek counsel or otherwise adequately prepare to defend their property rights. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Id.*, at 81. Had the Petitioners been given

adequate written notice of the hearing, they would have had an opportunity to properly prepare their defense, and a more fair and just result would likely have been the outcome. Regardless of the outcome of the foreclosure hearing, the wrong that was committed against the Petitioners by conducting the hearing under such conditions is ultimately the issue. "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.*, at 82.

The Petitioners now asks the Court to grant their Petition for Certiorari so that it may clarify whether adequate written notice is required in foreclosure actions. If the decisions of the lower courts are allowed to stand, the property interests of all mortgagors will remain in jeopardy of being terminated with little or no warning, should they become delinquent on their loan payments.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted, and the Court should allow Petitioners to file their brief and articulate more comprehensively why the South Carolina Court of Appeals failed to properly protect the rights to procedural due process which should be afforded mortgagors in foreclosure proceedings when it upheld a foreclosure wherein adequate notice of the foreclosure, as required by the terms of the mortgage, was not given. If the South Carolina Court of Appeals' decision goes unreviewed it will mean that mortgages may be foreclosed and citizens rights in their property be terminated without regard to whether adequate notice of the proceedings is given.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	90-CP-33-302
	)	(Filed Jan. 14, 1991)
PEE DEE FEDERAL SAVINGS BANK,	)	
PLAINTIFF,	)	
vs.	)	
JOHN T. CRAWFORD, MARY A. CRAWFORD, MARION NATIONAL BANK and PELICAN BUILDING CENTERS OF HORRY-GEORGETOWN, INC., D/B/A MYRTLE BEACH LUMBER COMPANY	)	
DEFENDANTS.	)	

DECREE OF FORECLOSURE

This is an action for foreclosure of a Real Estate Mortgage. The Summons and Complaint bearing date of November 2, 1990, were duly filed in the office of the Clerk of Court for MARION county, SOUTH CAROLINA, on November 6, 1990, and were personally served upon the defendants John T. Crawford and Mary A. Crawford on

November 9, 1990, as evidence by Affidavits of Personal Service filed in the cause. The defendants Marion National Bank and Pelican Building Centers of Horry-Georgetown, Inc., d/b/a Myrtle Beach Lumber Company have been duly served and have filed their Answers in a timely manner. The Defendants John T. Crawford and Mary A. Crawford are now in default and an Affidavit of Default has been filed. This case was referred to me, as Special Referee, by Order dated January 2, 1991, to take the testimony and to enter judgment, without further Order of the Court.

The matter was heard by me as a Special Referee on January 10, 1991, at Marion, South Carolina. Appearing at said reference was John P. Williams, Jr., attorney for Plaintiff, and J. M. McLendon, attorney for Defendant Marion National Bank. The testimony given and taken at the residence is attached hereto.

Offered and admitted into evidence without objection on behalf of the Plaintiff were a promissory Note and a Real Estate Mortgage, made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of Plaintiff, in the principal sum of Thirty-Five Thousand and No/100's ($35,000.00) Dollars. The Promissory Note and Real Estate Mortgage are dated February 26, 1986, which said Mortgage having been recorded on February 26, 1986, in Real Estate Mortgage Book 300, at page 201, in the office of the Clerk of Court for Marion County, South Carolina.

Offered and admitted into evidence without objection on behalf of the Defendant Marion National Bank were a Promissory Note and a Real Estate Mortgage, made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of said Defendant, in the principal sum of Ten-Thousand and No/100's (10,000.00) Dollars. The Promissory Note and Real Estate Mortgage are dated November 8, 1988, with said Mortgage having been recorded on November 10, 1988, in Real estate Mortgage Book 341,

at page 156, in the office of the Clerk of Court for Marion County, South Carolina.

Offered and admitted into evidence without objection on behalf of the Defendant Pelican Building Centers of Horry-Georgetown, Inc. were a Promissory Note and a Real Estate Mortgage, made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of said Defendant, in the principal sum of Forty-Three Thousand Five Hundred Ninety-Three and 88/100's ($43,593.88) Dollars. The Promissory Note and Real Estate Mortgage are dated August 9, 1989, with said Mortgage having been recorded on August 9, 1986, in Real estate Mortgage Book 351, at page 33, in the office of the Clerk of Court for Marion County, South Carolina.

From the testimony and evidence having been review of the exhibits and the pleadings filed in the cause, I make the following findings of fact:

1. I find that on February 26, 1986, for value received, Defendants John T. Crawford and Mary A. Crawford executed and delivered unto Pee Dee Federal Savings and Loan Association in the sum of Thirty-Five Thousand and No/100's (35,000.00) Dollars, together with interest thereon from said date until paid at the rate of Twelve (12%) percent per annum, payable monthly in advance, to be paid in monthly installments of Three-hundred Sixty-Eight and 63/100's Dollars ($368,63) payable on the first day of each calendar month, commencing on the first day of April 1986, and continuing thereafter until the full sum of principal and interest due thereunder has been paid, all of which will be more fully shown by reference to said Promissory Note which was admitted into evidence and identified by Plaintiff's exhibit #1.

2. I further find that in order to better secure the payment of said Promissory Note and in accordance with the terms and conditions thereof, the Defendants John T.

Crawford and Mary A. Crawford made, executed and delivered unto Pee Dee National Savings and Loan Association their certain mortgage, in writing, wherein and whereby they conveyed by way of mortgage the property described therein, being the identical property set forth and described in the Complaint herein; that said mortgage was recorded in the office of the Clerk of Court for Marion County on February 26, 1986, in Real estate Mortgage Book 300, at page 201.

3. I further find that the terms and conditions of said note and mortgage have been broken, the Defendants John T. Crawford and Mary A. Crawford having defaulted in the payments required under the terms of said note and mortgage on October 15, 1990, at which time there was due and owing to the Plaintiff on said note and mortgage the sum of Thirty-five Thousand Three Hundred Forty-two and 70/100's ($35,342.70) Dollars; that interest has occurred on the said indebtedness from the said default from the date of the hearing in the amount of Nine Hundred Forty-five and 11/100's ($945.11) Dollars, and there is now due and owing on said note and mortgage to the plaintiff the sum of Thirty-six Thousand Two Hundred Eighty-seven and 81/100's ($36, 287.81) Dollars, principal and interest to January 10, 1991, with interest thereafter at the rate of $11.73 per diem

4. I further find that said mortgage is , and constitutes, a valid first lien covering said premises.

5. I further find that a Promissory Note held by plaintiff and executed by the Defendants John T. Crawford and Mary A. Crawford provides for the addition of reasonable attorney's fees and cost in the event of default, the plaintiff has occurred the sum of Seventy ($70.00) Dollars as taxable cost prior to the date of this hearing, and that Three Thousand ($3,000.00) Dollars, is a reasonable fee to be allowed to plaintiff's attorney for services rendered and to be rendered in this action.

6. I further find that plaintiff Pee Dee Federal Savings Bank seeks foreclosure of said mortgage in this action and waives its right to deficiency judgment in this action.

7. I further find that the Promissory Note and Real Estate Mortgage made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of the defendant Marion National Bank constitutes a valid second lien on the subject property, junior in priority only to the lien of Plaintiff's Mortgage; that there is due and owing thereon the sum of Ten Thousand Seven Hundred Forty-three and 88/100's ($10, 743.88) Dollars, principal and interest thereafter at the rate of $3.61 per diem; that the said note and mortgage provide for the addition of reasonable attorney's fees in the event of default or should the note and mortgage be placed in the hands of an attorney for collection and that the sum of Five Hundred ($500.00) Dollars is a reasonable fee for the services of this Defendant's attorney; that the total due and owing to this Defendant as of the date of this hearing is the sum of Eleven Thousand Two Hundred Forty-three and 88/100's ($11, 243.88) Dollars, principal , interest and attorney's fees.

8. I further find the promissory Note and Real Estate Mortgage made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of the Defendant Pelican Building Centers of Horry-Georgetown, Inc., constitutes a valid third lien on the subject property, junior in priority only to the liens of the mortgage given to the plaintiff and the defendant Marion National Bank, and that there is due and owing thereon the sum of Thirty-four Thousand Two Hundred Fourteen and 28/100's ($34,214.28) Dollars, principal and interest through November 28, 1990, with interest thereafter at the rate of $11.25 per diem.

Upon due consideration of the pleadings, the testimony and the premises, it is

ORDERED, ADJUDGED AND DECREED, that the Plaintiff Pee Dee Federal savings Bank have judgment against the Defendants John T. Crawford and Mary A. Crawford in the amount of Thirty-six Thousand Two Hundred Eighty-seven and 81/100's ($36,287.81) Dollars, principal and interest through January 10, 1991, with interest thereafter at the rate of $11.73 per diem, together with Three Thousand ($3,000.00) Dollars as attorney's fees for the services of the plaintiff's attorney herein, amounting in the whole to the sum of Thirty Eight Thousand Two Hundred Eighty-seven and 81/100's ($39,287.81) [sic.] Dollars, principal, interest and attorney's fees, with interest from and after January 10, 1991, at the rate of $11.73 Dollars per diem. And it is

FURTHER ORDERED, ADJUDGED AND DECREED that the equity of redemption be barred, and the rights of the defendants and all persons claiming by, through or under them be forever ended and barred. And it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the mortgaged lands and premises described in the Complaint be sold at public auction, before the Courthouse rear door, in the City of Marion, Marion County, South Carolina, by the undersigned, as Special Referee, upon the following terms, to wit: For cash to the highest bidder, on sales day in February, 1991, it being the 4th day of the said month, at 12:00 Noon, or on any subsequent convenient sales that thereafter, purchaser to pay for all papers and revenue stamps, and should the successful or highest bidder fail or refuse to comply with his bid, then said land and premises to be resold on the same day or any subsequent convenient sales day there after at the risk of the defaulting bidder, without any further Order of the Court; that the highest bidder, except the Plaintiff, be required to deposit at least 10 (10%) per cent of his bid immediately as evidence of good faith, to be applied as liquidated damages in the event of noncompliance; that the usual due public notice be given by

advertisement for at least three (3) weeks in The Marion Star and Mullins Enterprise, a newspaper published in the City of Marion, State and County aforesaid, stating the time and place of said sale and the terms thereof, and the deficiency judgment not having been demanded, the bidding will not remain open but that immediate compliance may be had; that he execute to the purchaser a Deed to the lands and premises; and that out of the proceeds of such sale, after deducting all lawful costs, expenses, and taxes, the balance shall be paid out first to the plaintiff in the amount as hereinabove found and described, next to the Defendant Marion National Bank in the amount hereinabove described of principal, interest and attorney's fees, next to the Defendant Pelican Building Centers of Horry-Georgetown, Inc., in the amount hereinabove described, with the remainder thereof, if any , to be held pending further Order of the Court; that the purchaser at such sale shall comply with his bid within Twenty (20) days thereof and that a Deed to said lands and premises be executed by the said W. B. Norton, Jr., as Special Referee of Marion County, to the purchaser and that the purchaser be let into possession upon the production of said Deed.

The following is a description of the lands and premises hereinabove mentioned and ordered sold:

All that certain parcel or lot of land lying and being situate on the east side of Henry Street, inside the corporate limits of the City of Marion, Marion County, South Carolina. Said lot being shown and designated as Lot Number 3 on a map of property surveyed for R. W. Vaught, Sr., which said map is recorded in the office of the Clerk of Court for Marion County, South Carolina, in Plat Book 29, at Page 114. Said lot measures 60 feet on its Western boundary whereon it bounds Henry Street; 106.73 feet on its Northern boundary whereon it bounds Lot Number 2 on said map; 60 feet on its Eastern boundary whereon it bounds lands of R. W. Vaught, Sr., and 104.85 feet on its Southern boundary whereon it

bounds lands of R.W. Vaught, Sr.

This being one of those two certain lots of land conveyed to the mortgagors herein by deed of Jonathan D. Dozier Trust dated August 29, 1985, and recorded in the office of the Clerk of Court for Marion County, South Carolina, in Deed Book A-221 at page 295.

S/ W. B. Norton, Jr.,
Special Referee For Marion
County, South Carolina

MARION, SOUTH CAROLINA,
JANUARY 10, 1991.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	90-CP-33-300
	)	JUDGMENT ROLL
PEE DEE FEDERAL SAVINGS BANK,	)	19549-A
	)	AND
PLAINTIFF,	)	
	)	90-CP-33-301
vs.	)	JUDGMENT ROLL
	)	19550-A
JOHN T. CRAWFORD, MARY A. CRAWFORD, AND PELICAN BUILDING CENTERS OF HORRY-GEORGETOWN, INC., D/B/A MYRTLE BEACH COMPANY.	)	AND
	)	90-CP-33-302
	)	JUDGMENT ROLL
	)	19551-A
DEFENDANTS.	)	

ORDER

These three cases are before the court on Motion of the Defendants John T. crawford and Mary A. Crawford to vacate the judgments dated January 10, 1991. A hearing on the Motion was held on Tuesday, October 29, 1991, at 11:00 a.m., at Marion, South Carolina. During the course of said hearing were Brenda Reddix-Smalls, attorney for Defendants John T. Crawford and Mary A. crawford, and John P. Williams, Jr., attorney for Plaintiff.

These three cases were mortgaged foreclosure actions

brought by plaintiff Pee Dee Federal savings Bank to foreclose four real estate mortgages. The foreclosure actions were commenced by the filing of a Summons and Complaint in each case on November 2, 1990. The Defendants crawford did not Answer or otherwise appear and Affidavits of Default were filed. These cases were referred to me, with finality, by Order of Reference dated January 2, 1991, and were heard by me on January 10, 1991. the Defendants Crawford did not appear at the hearings and Judgments were issued on January 10, 1991. The real property describe in the four mortgages was subsequently sold by me on February 4, 1991, with plaintiff being the highest and only bidder

The Defendants Crawford now move the court to have the Judgments of foreclosure and sale vacated pursuant to Rule 60 (b) (5) SCRCP, which provides that the Court

"...may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

The defendants contend that they are entitled to such relief on the grounds that they were not given notice of the date, time and place of hearings. Defendants' attorney also argued, upon the hearing of this motion, that the record did not reflect that plaintiff complied with certain notice requirements set forth in the various real estate mortgages.

present at the hearing on Defendants' motion were the Defendants' attorney, Brenda Reddix-Smalls, and the Defendants John T. crawford and Mary A. Crawford. Also present were William H. Johnson, Jr., Executive Vice President of Plaintiff, and John P. Williams, Jr., attorney for Plaintiff. No testimony or affidavits were submitted by the

defendants in support of their motion. Plaintiff submitted an affidavit of Plaintiff counsel in opposition to Defendant's motion in which it was averred, inter alia, that Plaintiff's counsel gave the Defendants Crawford oral notice of the date, time and place of the hearings. Defendants did not deny any of the averments of plaintiffs affidavit.

FINDINGS OF FACT

From a review of the pleadings, the Decrees of Foreclosure, and the affidavit of plaintiff's counsel submitted in opposition of Defendant's motion, i make the following findings of fact:

1. I find that the Defendants Crawford were properly served with copies of the Summons and Complaint in each of these actions on November 9, 1990; that they failed to appear or file responsive pleadings in response to the requirements of the Summons in each of these cases and thereby made default; that affidavits of default were filed in each of these three actions.

2. I further find that the Complaints herein set forth with particularity the amount of indebtedness due the Plaintiff under each of the four promissory notes and real estate mortgages and, in addition thereto, sought to recover the cost incurred by plaintiff in the foreclosure actions, including "reasonable attorneys fees".

3. I further find that the Defendants Crawford had actual knowledge of the date, time, and place of the hearings, having been so informed by Plaintiff's attorney two or three days prior to hearing, but did not appear.

4. I further find that hearings were held in each of these three cases on January 10, 1991, which resulted in the issuance of decrees of foreclosure dated January 10, 1991; that pursuant to the said decrees, the subject properties were subsequently sold by me on February 4, 1991, with plaintiff

being the highest and only bidder; that deeds to the subject properties were duly issued to plaintiff.

CONCLUSION OF LAW

A party who does not respond to the requirements of a Summons and makes default is deemed to have admitted all well pled facts of the Complaint. Gadsden vs. Home Fertilizer & Chemical Company 89 S.C. 483, 72 S.E. 15 (1911), Rule 8(d) SCRCP. These Defendants did not answer or otherwise plead in response to the requirements of the Summons and Complaints. By failing to do so, they admitted all well pled facts alleged in the Complaints and waived any defenses they may have had.

defendants argue that they are entitled to have the judgments vacated on the grounds that they were not given notice of the date, time, and place of hearing. they argue that they were entitled to such notice under Rule 5(A) SCRCP because, even though they were in default, the Complaints set forth claims for unliquidated damages. Each of the Complaints set forth the indebtedness of principal and interest due under each of the notes and mortgages as of October 15, 1990, and alleged that Plaintiff was entitled to interest from said date at the interest rates provided in the various notes, plus all costs of the various actions, as well as "reasonable attorneys fees" in each of these actions constituted claims for unliquidated damages. Rule 71 SCRCP provides, inter alia, that "only parties who have appeared and filed pleadings in the action shall be entitled to the usual notice of hearings and other proceedings unless the pleadings state an unliquidated claim." Defendants rely on dicta in the case of Peoples Federal Savings & Loan Association vs. Graham, 291 S>C> 178, 352 S. E. 2nd 511 (ct. App. 1987) , for the proposition that the claims for reasonable attorney's fees in these actions constitute unliquidated claims. A claim is liquidated if the

sum claimed is certain or capable of being reduced to a certainty. Dibble v. Sumter Ice & Fuel Company, 283 S. C. 278, 322 S. E. 2nd 674 (ct. App. 1984). The threshold question is whether plaintiff's complaints set forth unliquidated claims, so as to require notice of the hearings under SCRCP 5(A). It appears to the Court that the Complaints in these actions set forth liquidated claims. The amount of indebtedness owed was set forth with particularity and constituted sums capable of being reduced to a certainty, as required by Dibble. The claims for reasonable attorney's fees were, in the opinion of the Court, merely incidental to the foreclosure claims and do not justify characterization of the Complaints and constituting unliquidated claims. Thus, not having appeared and filed responsive pleadings, the Crawfords were not entitled to any notice of the hearings, under Rule 71. even if these Defendants were entitled to notice of the hearings, it is undisputed that they were given oral notice of the date, time and place of the hearings in these three actions. Nevertheless, they elected not to attend the hearings. Rule 5(A) is silent to the manner of notice of a hearing in a default situation involving unliquidated damages. Even if the Defendants were entitled to notice of the hearings in some different manner, this Court will not vacate or modify its judgments because of any defect or error in the proceedings which does not affect the substantial rights of the parties. Rule 61 SCRCP. In as much as the Defendants Crawford admittedly had actual notice of the date, time, and place of the hearings, the Court finds that their failure to receive notice by some other method did not effect their substantial rights and on the ground alone their motion should be denied.

The defendants also argued that the record did not reflect compliance on the part of the Plaintiff with certain notice requirements of the mortgages. These are questions which should have been raised by timely Answers to the

Complaints. In order to raise those questions at this time , it appears to the Court that the defendants would have to seek relief from the default judgments rendered against them pursuant to Rule 60(b) (1) SCRCP, which provides for relief from a judgment because of mistake, inadvertence, surprise, or excusable neglect. The Defendants have not so moved the court and have not established the right to be so relieved. For such relief, they must establish mistake, inadvertence, surprise, or excusable neglect, and the existence of a meritorious defense. Thompson v. Hommond 382 S. E. 2nd 900, 299 S.C. 116 (1989). No showing whatsoever was made by Defendants as to mistake, inadvertence, surprise, or excusable neglect, nor was there any evidence to indicate that the defendants have a meritorious defense. The arguments of the mortgages are thus without merit.

During the hearing on this motion, I informed Defendants and their attorney regarding a transaction between my son, William B. Norton, III, and the Plaintiff, Pee Dee Federal Savings Bank. William B. Norton, III borrowed the sum of $50,000.00 from Plaintiff for the purpose of buying a lot near Murrells Inlet in Georgetown County, South Carolina. Since he planned to move a house onto the lot and refurbish it, his transaction presented an unusual situation for the bank, and additional collateral was required during the construction period. In order to facilitate the financing, I gave to plaintiff a real estate mortgage on my residence in Marion County, with the agreement that once the Murrells Inlet home was completed and appraised my property would be released. Additionally, Plaintiff's attorney in this action, John P. Williams, Jr., represented my son at closing, although he was not involved in the examination of the Murrells Inlet property. This information was related to Defendants' counsel so that Defendants would be fully informed thereabouts. Defendants' counsel moved for recusal upon learning of the existence of this transaction.

I am especially concerned about allowing even the appearance of impropriety and/or appearing to be anything other than completely impartial. While I am convinced of my ability to be completely impartial in this matter, it was because of my concerns regarding appearances that this information was related to Defendants and their attorney. Additionally, my concerns in this regard were related, through Plaintiff's attorney, to the presiding circuit court judge, to present an opportunity for the appointment of a Substitute Special Referee or any other action he might feel necessary. I was not so replaced and in as much as this case was referred to me with finality, I feel that any decision on the motion for recusal must be made in the interest of justice and to protect the interests of both parties. these cases are over one year old, and the motion to vacate has been pending for at least six months. Additional delay certainly would not serve the ends of justice. Therefore, while I might prefer that some other Judge hear and rule on this motion, I can only decline if required by law. the Code of Judicial Conduct, found in Appellate Court Rule 501, does not, in my opinion, require recusal in this situation. To suggest that any kind of financial relationship constitutes grounds for recusal goes far beyond both the Canons of Judicial Conduct and the requirements for proper administration of justice. It is for that reason that the Canons of Judicial Conduct do not require recusal under every circumstance. Canon 3C(1) states that a Judge should disqualify himself in any proceeding in which his impartiality might be reasonably questioned, and goes on to enumerate a nonexclusive list of instances in which a Judge should disqualify himself, principally where he or some member of his family might have or appear to have some interest in the outcome. It is my opinion that the circumstances surrounding this transaction with the Plaintiff do not warrant recusal and that the Defendants' motion should be denied. It is therefore

ORDERED, that the motion of the Defendants John T. Crawford and Mary A. Crawford to vacate the judgments in the within actions is denied; and it is

ORDERED, that Defendants' motion for recusal is denied.

AND IT IS SO ORDERED.

December 4, 1991 s/ W. B. Norton, Jr.
Special Referee

Marion, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Pee Dee Federal Savings Bank,. . . Respondent,

v.

John T. Crawford and Mary A. Crawford,. . . .
. . . . . Appellants.

Appeal from Marion County
W. B. Norton, Jr., Special Referee

Unpublished Opinion No. 93-UP-179
Submitted May 10, 1993 - Filed June 14, 1993

AFFIRMED

Brenda Reddix-Smalls, of Columbia, for appellants.

John P. Williams, of Marion, for respondent.

PER CURIUM: Pee Dee Federal savings Bank brought actions to foreclose four mortgages on real estate given by John T. Crawford and Mary A. Crawford to secure repayment of loans made by the bank. The Crawfords did not file an Answer or other responsive pleading in any of the cases. The matter was referred to a special referee for hearing and entry of final judgment. A hearing was set and

held. The Crawfords did not appear at the hearing. The special referee issued a decree of foreclosure and sale of the property was duly sold. After the sale, the Crawfords moved to vacate the judgment of foreclosure on the ground that they were not given written notice of the foreclosure hearing. The special referee heard and denied the motion. The Crawfords appeal. We affirm.

The record reflects that the Crawfords did not receive the written notice of hearing prescribed by Rule 5 (a), SCRCP. However, the record shows the Crawfords had actual knowledge of the date, time and place of the foreclosure hearing, but, for whatever reason, did not appear. On these facts, the familiar law that "no one needs notice of what he already knows" applies. See Walker v. Preacher, 185 SC 124, 128, 367 S. E. 2d 430, 433 (ct. App. 1988). Accordingly, we affirm the special referee's order denying the motion to vacate the judgment. In view of this disposition, we need not address the other issues raised by the appeal.

AFFIRMED.

_____, J.

_____, J.

_____, A. J.

THE SOUTH CAROLINA COURT OF APPEALS

Pee Dee Federal Savings Bank, ... Respondent,

v.

John T. Crawford, ...Appellants.

ORDER

After careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principal of law has been either overlooked or disregarded, and hence, there is no ground for a rehearing. It is therefore ordered that the petition for Rehearing be denied.

_____, J.

_____, J.

_____, A. J.

Columbia, South Carolina
September 8, 1993.

THE SUPREME COURT OF SOUTH CAROLINA

September 22, 1994

Mr. John T. Crawford
Ms. Mary A. Crawford
P. O. Box 474
Rains, S. C. 29589

Re: Pee Dee Federal Savings Bank vs. John T. Crawford and Mary A. Crawford, et al.

Dear Mr. and Ms. Crawford:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of certiorari denied.

S/ A. Lee Chandler C. J.
For the Court
Associate Justice John H. Waller, not participating

September 22, 1994."

Please advise the Court of what disposition you would have us make of the extra copy of record in this matter. If we have not heard from you to the contrary, we will destroy the record on October 3, 1994.

Very truly yours,

S/ Brenda F. Shealy

DEPUTY CLERK

BFS/dmh

Copy to: John P. Williams, Esquire
The Honorable Kenneth Richstad
The Honorable Martha Saxon
West Publishing Company